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I. Introduction

The Copyright Alert System represents the newest venture by the contemporary intermediary regime to intensify copyright enforcement. In July 2011, the Recording Industry Association of America ("RIAA") and the Motion Picture Association of America ("MPAA") signed an agreement with five major national internet service providers ("ISPs")—AT&T, Cablevision, Comcast, Time Warner Cable, and Verizon. This Memorandum of Understanding ("MOU") details the creation of a Copyright Alert System ("CAS"), a new and entirely private mechanism for copyright enforcement. Under CAS, content rightsholders—composed most prominently of the RIAA and MPAA—monitor and notify ISPs of any internet protocol addresses ("IP addresses") participating in peer-to-peer file sharing. The ISPs utilize this information, and by referencing the customer registered to that IP address at the alleged time, issue the customer a Copyright Alert. Alerts are graduated, with accompanying penalties that increase in severity.

Prior to CAS, content rightsholders embarked on legal and legislative campaigns that, although highly successful in the courts, resulted in significant normative backlash—producing counterproductive results of continued file sharing and infringement. With the signing of the Copyright Alert System's Memorandum of Understanding, content rightsholders seemed poised to make that same mistake again.

However, in a prime example of "normative avoision," content rightsholders have finally taken note of the normative consequences of their enforcement methods and, through subsequent changes to CAS, have deftly sidestepped the normative backlash dilemma. Content rightsholders have created a split enforcement regime that focuses litigation on frequent file sharers with deeply internalized pro-sharing norms, and pro-copyright education on nascent to moderate file sharers who have not yet deeply internalized pro-sharing norms. In light of content rightsholders recent litigation and legislative campaign debacles, the Copyright Alert System represents a new leaf for their pro-copyright efforts.

II. Background

A. Normative Backlash

In *Copyright Backlash*, Professor Ben Depoorter argues that punitive enforcement of copyright infringement statutes creates a normative backlash effect by strengthening anti-copyright positions:

> [C]opyright enforcement is a double-edged sword. While stringent sanctions have a modest deterrent effect on file-sharing behavior, they increase anti-copyright sentiments among frequent offenders. This raises a spectacular challenge for copyright enforcement: the more copyright owners push to step up sanctions for copyright infringements, the more the public resents the protected rights. Consequently, stepping up sanctions tends to increase—rather than decrease—the rate and frequency of infringing activities.[1]

Professor Depoorter likens the conditions that copyright law faces today to those encountered at times in the past, such as under Prohibition the early twentieth century.[2] The concept of a normative backlash can be summed up as follows: where noncompliance is widespread, effective deterrence can only be obtained by raising enforcement to levels that undermine the support for the underlying rules.[3] A slightly different formulation highlights the normative elements in a backlash scenario: "[w]hen behavior is driven by normative viewpoints, imposing laws that are perceived as 'unjust' or 'illegitimate' [may] reinforce and strengthen the underlying opposition against those laws."[4] The public may, for example, perceive laws as unjust if the associated sanctions seem excessive in relation to the punished behavior.[5] Under these conditions, enforcement has the unintended and counterproductive effect of moving behavior in the opposite direction from that intended by the law.[6]

Professor Depoorter applies the normative backlash structure to modern copyright enforcement and finds that content rightsholders' deterrence-based litigation approach will likely prove counterproductive to the goals of copyright holders.[7] Professor Depoorter finds the necessary elements for normative backlash present in the widespread noncompliance fueled by normative viewpoints, in the heightened legal campaign against noncommercial

1. Ben Depoorter et al., *Copyright Backlash*, 84 S. CALIF. L. REV. 1251, 1252 (2011).
2. *Id.* at 1269.
3. *Id.* at 1252.
4. *Id.* at 1269.
5. *Id.*
6. *Id.* at 1252.
7. *Id.* at 1256.

users, and in the public's "adverse reaction to the strict enforcement of copyright law."[8]

First, noncompliance is widespread in the online file sharing context. A 2003 Gallup Poll survey found that 83% of teenagers believed sharing digital music was morally acceptable.[9] At the same time, a substantial portion of the public views the current statutory damages framework as excessive, unjust, and punitive—far above and beyond actual compensatory damages.[10] For example, in *Sony BMG Music Entertainment v. Tenenbaum*, a graduate student was ordered to pay $675,000 for sharing 30 songs—$22,500 per song.[11] In *Capitol Records, Inc. v. Thomas-Rasset*, a single mother was ordered to pay $1.92 million for sharing 24 songs.[12] Yet despite these sky-high penalties, file sharing has continued, largely unabated.[13] A 2011 study by Sandvine reports that BitTorrent is still responsible for 21.6% of residential Internet traffic in North America.[14] Compare this to the top result for residential Internet traffic—Netflix at 22.2%,[15] and it becomes apparent that online infringement has not slowed.[16] Thus,

8. Depoorter, et al., *supra* note 1, at 1266

9. Steven Hanway & Linda Lyons, Teens OK With Letting Music Downloads Play, GALLUP POLL, Sept. 30, 2003, *available at* http:// www.gallup.com/poll/9373/teens-letting-music-downloads-play.aspx.

10. *See* Pamela Samuelson & Ben Sheffner, *Debate, Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. PA. L. REV. PENNUMBRA 53 (2009). But *see* Colin Morrissey, *Note, Behind the Music: Determining the Relevant Constitutional Standard for Statutory Damages in Copyright Infringement Lawsuits*, 78 FORDHAM L. REV. 3059 (2010) (arguing that the statutory damages framework was not intended to be punitive but remunerative of actual damages).

11. Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 489 (1st Cir. 2011).

12. Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1050 (D. Minn. 2010).

13. *See* Simon Crerar, *Illegal File-Sharing As Popular As Ever*, TIMES (London), Jan. 19, 2006, *available at* http://www.thetimes.co.uk/tto/arts/music/article2418137.ece; Enigmax, File-Sharing Prospers Despite Tougher Laws, TORRENTFREAK.COM (May 22, 2012), http://torrentfreak.com/file-sharing-prospers-despite-tougher-laws-120522.

14. Janko Roettgers, *Sorry, Hollywood: Piracy may make a comeback*, GIGAOM.COM (Aug. 11, 2011, 2:02 PM), http://www.gigaom.com/2011/08/11/file-sharing-is-back ("[P]iracy never actually declined. It just didn't grow as fast as other types of media consumption."). Netflix is the single largest source of Internet traffic on North America's fixed access networks at 22.2%. *Id*; *see also* Sandvine, GLOBAL INTERNET PHENOMENA SPOTLIGHT NORTH AMERICA, FIXED ACCESS, SPRING 2011 at 2, *available at* http://www.wired.com/images_blogs/business/2011/05/SandvineGlobalInternetSpringReport2011.pdf [hereinafter "Sandvine Report"].

15. Sandvine Report at 2.

16. Mike Masnick, *File Sharing Continues To Grow, Not Shrink*, TECHDIRT.COM (Aug. 12, 2011, 11:45 AM), www.techdirt.com/articles/20110812/01061715485/file-sharing-

noncompliance has been, and continues to be, widespread in the online infringement context.

Second, over the past decade, content rightsholders, most notably the entertainment industry, have waged a largely successful legal campaign to heighten the enforcement and punishment for online copyright infringement. In a series of high-profile decisions, content rightsholders have persuaded courts "to accept expansive interpretations of contributory enforcement, to create novel doctrines of copyright infringement, and to apply broad interpretations of statutory damage provisions."[17] According to copyright backlash theory, it is the very success of this legal campaign, and the ever-higher sanctions it imposes on the public, that may fuel a counterproductive normative backlash.

In *Copyright Backlash*, Professor Depoorter conducted a number of experimental studies to explore the potential for counterproductive normative effect on various types of infringers.[18] By varying the probability and severity of monetary sanctions,[19] Professor Depoorter determined that a counterproductive effect on pro-copyright sentiments existed in relation to the probability and severity of sanctions.[20] Increasing either the probability or the severity of sanctions produced a counterproductive effect. Moreover, increasing both the probability and severity of sanctions produced a "powerful counterproductive effect, increasing anti-copyright norms."[21] Finally, Professor Depoorter found that elevated sanctions have a stronger effect on deterrence than increasing the probability of sanctions. Significantly, however, elevated sanctions also generated greater backlash effects.[22]

Because the marginal benefits of increasing the severity of punishment is greater than the equivalent increase in the probability of punishment, Professor Depoorter suggests that it will be more financially efficient for content rightsholders to increase the severity

continues-to-grow-not-shrink.shtml ("None of the actions taken by the industry appear to have slowed down infringement online. Instead, it appears that it just keeps growing.").

17. Depoorter, et al., *supra* note 1, at 1251. This article explores the successful litigation campaign and the concept of legal overdeterrence below in Part II.B.

18. *Id*. at 1279–80.

19. *Id.* at 1280.

20. *Id.*

21. *Id.*

22. *Id.* ("[H]igh-severity/low-probability enforcement conditions generate higher backlash effects as well as higher levels of deterrence than low-severity/high-probability enforcement—even though, interestingly, both enforcement regimes impose identical expected costs.").

of sanctions.[23] However, in what Professor Depoorter dubs "the irony of deterrence," increasing the severity of sanctions also strengthens anti-copyright norms in the public.[24]

Professor Depoorter's concluding remarks offer a potential solution to content rightsholders: "[E]nforcement efforts would likely be more effective if targeted specifically to different types of copyright offenders. . . . By focusing litigation on frequent offenders, copyright holders bolster anti-copyright norms among this group, while foregoing opportunities to promote pro-copyright norms among occasional infringers."[25] And indeed, content rightsholders have taken the concept of normative backlash to heart when developing and implementing the Copyright Alert System.[26]

B. The Litigation Campaign by Content Rightsholders

Content rightsholders have largely succeeded in ratcheting ever-higher copyright enforcement within the court system. First, content rightsholders have expanded the scope of copyright protection through intermediary liability. Second, content rightsholders, and in particular the RIAA and MPAA, have aggressively pursued individuals for what historically has been deemed noncommercial copying. Finally, content rightsholders have prevailed upon courts to apply expansive and severe statutory penalties against these private individuals for online copyright infringement.[27]

First, content rightsholders have greatly expanded the scope of copyright protection through intermediary liability. When online file sharing became prevalent in the late 1990s, the legality of online, noncommercial file sharing was still uncertain. In the pivotal case of *A&M Records, Inc. v. Napster, Inc.*, the Ninth Circuit departed from conventional noncommercial fair use theory to find Napster users directly infringed the plaintiffs' copyrights.[28] Once the court found that noncommercial file sharing by private users could qualify as direct infringement, the path was inevitably paved towards intermediary liability for the developers of file sharing platforms. The Ninth Circuit found the developers of the Napster software liable

23. Depoorter, et al., *supra* note 1, at 1286.
24. *Id*. at 1286.
25. *Id.* at 1289.
26. *See infra* Part V.
27. *See generally* Depoorter, et al., *supra* note 1.
28. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001).

under a theory of contributory liability.[29] By centrally hosting the database of shared files on its users' computers, Napster provided the "site and facilities" enabling the direct infringement, and therefore "materially contributed" to their users' copyright infringement.

The Supreme Court would expand the bounds of intermediary liability even further in *MGM Studios, Inc. v. Grokster, Ltd*.[30] In *Grokster*, the defendant did not centrally host files or databases that would qualify as the "site and facilities" necessary to meet the contributory liability test under *Napster*.[31] Nonetheless, the Court found the intermediary liable by creating a novel doctrine of inducement.[32] Under this new inducement theory, the Court held that mere distribution of software with the *intent to promote* copyright infringement creates secondary infringement liability.[33]

Second, content rightsholders have aggressively pursued individuals for what historically has been deemed noncommercial copying. As online file sharing continued to skyrocket in the early 2000s, the RIAA began targeting the individual users of file sharing technologies and doing so en masse. In September 2003, the RIAA began sending subpoenas to file sharers via their ISPs, eventually settling most cases via pre-litigation letters for approximately $3,000.[34] By 2008, the RIAA sued roughly 35,000 persons for online file sharing.[35] The MPAA entered the fray in 2004 when it launched its own lawsuits against individual sharers.[36] The litigation campaign against individuals thus seems to have grown exponentially. For example, in 2012, one movie studio sued almost 25,000 individual users in a single case.[37]

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29. *A&M Records*, 239 F.3d at 1020.

30. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936 (2005).

31. *Id.* at 919–20.

32. *Id.* at 936–37.

33. *Id.* ("[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.").

34. Depoorter, et al., *supra* note 1, at 1260.

35. *See* Ethan Smith & Geoffrey A. Fowler, *Ganging Up on Internet Pirates Hollywood: Telecom Providers Unite to Target Those Who Share Copyrighted Films*, WSJ.COM (July 8 2011), http://online.wsj.com/news/articles/SB10001424052702303365804576432270822271148.

36. Fred Locklear, *MPAA lawsuits target BitTorrent, eDonkey and Direct Connect networks*, ARS TECHNICA (Dec. 14, 2004, 5:33 PM), http://arstechnica.com/uncategorized/2004/12/4467-2/.

37. Sarah Jacobsson Purewal, *'Hurt Locker' Studio Sues 2,514 Over Copyright Infringement*, PCWORLD.COM (Apr. 24, 2012, 7:41 AM), http://www.pcworld.com/article/254381/hurt_locker_sue_2_514_over_copyright_infringement.html ("Voltage

Contents rightsholders have also hurdled considerable obstacles in obtaining judgments against individuals. The evidentiary issue of proving that a file in a shared folder was actually downloaded from the alleged file sharer's computer is one such example. However, the courts haven given short shrift to the issue by ruling that dissemination could be presumed based on mere accessibility.[38] This evidentiary presumption enabled content rightsholders to pursue a number of questionable claims. For example, in 2005 the RIAA sued a deceased 83-year-old woman whose daughter alleged she "hated computers."[39] As a result of these and other actions, critics have characterized content rightsholders' litigation campaigns as akin to blackmail, extortion, and harassment.[40]

Finally, content rightsholders have prevailed upon courts to interpret statutory damage provisions exceedingly broadly against private individuals for online copyright infringement. The Copyright Act provides for copyright holders to elect for statutory damages at any time during litigation.[41] For "willful infringement" of registered works, a court may increase the award of damages to a sum of $150,000 per instance of infringement of a copyrighted work.[42] By convincing courts to interpret "willful infringement" broadly, content rightsholders have successful obtained astonishingly high damages against online file sharers.[43] For example, one individual was ordered to pay $1.92 million for sharing 24 songs and another $675,000 for 30 songs.[44]

Here too, content rightsholders have handily overcome evidentiary issues of damages through alternative statutory damages.

Pictures, the movie studio that gained its fame by producing the Academy Award-winning film "The Hurt Locker" and targeting 24,583 BitTorrent users in a piracy-related lawsuit last year, is on another copyright infringement crusade."); *see also* Voltage Pictures, LLC v. Vazquez, 277 F.R.D. 28, 31 (D.D.C. 2011) (action brought against named defendants and Does 1–24,583).

38. *Capitol Records*, 579 F. Supp. 2d at 1222.

39. Andrew Orlowski, *RIAA Sues the Dead*, REGISTER (U.K.) (Feb. 5, 2005, 2:30 AM), http://www.theregister.co.uk/2005/02/05/riaa_sues_the_dead/.

40. *See, e.g.*, Nate Anderson, *The "Legal Blackmail" Business: Inside a P2P-Settlement Factory*, WIRED (Oct. 3, 2010, 10:30 AM), http://www.wired.com/epicenter/2010/10/the-legal-blackmail-business.

41. 17 U.S.C. § 504(c) (2012).

42. *Id.*

43. *See generally* Kate Cross, *David v. Goliath: How the Record Industry Is Winning Substantial Judgments Against Individuals for Illegally Downloading Music*, 42 TEX. TECH L. REV. 1031, 1042 (2010).

44. *See Sony BMG Music Entm't*, 660 F.3d at 490; *Capitol Records*, 579 F. Supp. 2d at 1050.

For instance, a traditional damages analysis might be nuanced enough to inquire into how many times a file was downloaded and whether a download correlates to a lost sale for the rightsholder. Such an analysis, though complex because of the nature of online file sharing, would be strongly indicative of the actual harm to the copyright holder.[45]

III. The Copyright Alert System

A. Memorandum of Understanding

On July 6, 2011, a group of content rightsholders—the MPAA, the RIAA, an association of independent record labels,[46] and a number of film production companies[47]—met with five of the largest Internet Service Providers ("ISPs")—AT&T, Cablevision, Comcast, Time Warner Cable, and Verizon—and signed a Memorandum of Understanding ("MOU") that outlined a Copyright Alert System ("CAS") designed to combat online peer-to-peer file sharing ("P2P" file sharing).[48] Under the CAS MOU, content owners identify and notify ISPs of infringing Internet Protocol addresses ("IP" addresses) along with the time and date the alleged infringement took place.[49] ISPs then cross-reference that data with their own internal databases to determine which subscriber's account was assigned that IP address at the relevant time.[50] The ISP then sends an Alert to that subscriber.[51] These Alerts constitute a graduated response system that includes "temporary reductions of Internet speeds, redirection to a landing page until the subscriber contacts the ISP to discuss the matter or reviews and responds to some educational information about copyright, or other measures that the ISP may deem necessary to help resolve the matter."[52]

45. *See generally* Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 746–49 (2003).

46. Represented by the American Association of Independent Music ("A2IM"). MEMORANDUM OF UNDERSTANDING, Center for Copyright Information 2 (July 6, 2011), http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf [hereinafter MOU].

47. Represented by the Independent Film and Television Alliance ("IFTA"). *Id*. at 2.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. David Kravets, *Copyright Scofflaws Beware: ISPs to Begin Monitoring Illicit File Sharing,* WIRED (Oct. 8, 2012, 4:10 PM), http://www.wired.com/threatlevel/2012/10/isp-file-sharing-monitoring/.

Actual implementation of CAS began as of March 2013—almost two years since the MOU was signed by the parties and more than five years since initial dialogue and negotiations first began.[53] As a result, most of the scholarship heretofore in the area of CAS has been speculatively based on the guiding MOU.[54] Having laid the groundwork of how CAS came about in Part II, Part III will discuss the MOU as originally signed and highlight significant lines of criticism. Part III will discuss the recently publicized implementation methodology, as detailed by signatories of the MOU.

1. The Center for Copyright Information

Section Two of the Memorandum of Understanding delineates the creation of the Center for Copyright Information ("CCI"), which is the private entity charged with the design and management of a Copyright Alert System.[55] Additionally, CCI is tasked with educating the public about copyright law, online infringement, and the civil and criminal consequences of such infringement.[56]

CCI is governed by a six-person Executive Committee.[57] Three committee members are selected by content rightsholders, and three committee members are selected by the participating ISPs.[58] Initial funding for CCI is also split fifty-fifty between the two groups.[59] However, there is no public interest or copyright expert representative on the Executive Committee. Instead, the MOU creates a separate three-person Advisory Board "drawn from relevant subject matter experts and consumer interest communities."[60]

As with the Executive Committee, the Advisory Board is essentially co-governed. Content rightsholders and ISPs each select one Advisory Board member, and the two selected Advisory Board

53. Congressional Internet Caucus Advisory Committee, *Congressional Internet Caucus Meets on Copyright and Piracy,* C-SPAN.org (Mar. 8, 2013), http://www.c-span.org/Events/Congressional-Internet-Caucus-Meets-on-Copyright-and-Piracy/10737438657-1 (Jill Lesser presenting).

54. *See, e.g.*, Annemarie Bridy, *Graduated Response American Style: "Six Strikes" Measured Against Five Norms,* 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 28 (2012); *generally* Mary LaFrance, *Graduated Response by Industry Compact: Piercing the Black Box,* 30 CARDOZO ARTS. & ENT. L.J. 165 (2012).

55. MOU, *supra* note 46, at 3.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 4, 14.

60. *Id.* at 3–4.

members select a mutually agreeable third member.[61] The Executive Committee is obliged to consult with the Advisory Board on any "significant issues" it is considering regarding the design and implementation of CAS.[62] Notably, the Advisory Board provides only nonbinding "recommendations" to the Executive Committee.[63]

The MOU envisions that CCI will also retain an Independent Expert—an "impartial technical expert" that would review on an ongoing basis the methodology of CAS and make recommendations "with the goal of ensuring and maintaining confidence on the part of the Content Owner Representatives, the Participating ISPs, and the public in the accuracy and security of the Methodologies."[64] Like the Advisory Board, the Independent Expert's recommendations are confidential and nonbinding on the Executive Committee.[65] "Failure to adopt a recommendation of the Independent Expert [does] not amount to a breach under [the MOU]."[66] This includes those instances where a particular Content Owner's methodology is found to be "fundamentally unreliable."[67]

If a Content Owner Representative Methodology is found by the Independent Expert to be fundamentally unreliable, the Independent Expert may issue a confidential finding of inadequacy only to that particular content owner.[68] Notification to participating ISPs,[69] wrongfully suspected subscribers, or other Content Owners using or contemplating similar methodologies is not required.[70]

2. The Six Strikes Structure

The escalating six-alert structure of CAS is modeled in theory after the French HADOPI[71] and Irish Eircom[72] graduated response

61. MOU, *supra* note 46, at 3.

62. *Id.* at 4.

63. *Id.*

64. *Id.* at 5.

65. *Id.*

66. *Id.*

67. *Id*.

68. *Id.* at 5.

69. It is uncertain based on the MOU whether the Independent Expert may disclose a finding of fundamental inadequacy to just the content rightsholder or also to affected ISPs. *See id.* However, participating ISPs other than those ISPs directly affected are expressly restricted from notice. *Id.*

70. *Id.*

71. *Lawmakers adopt Internet anti-piracy bill*, FRANCE24.COM (May 13, 2009), http://www.france24.com/en/20090512-lawmakers-adopt-internet-anti-piracy-bill-illegal-downloading-France.

systems. Under the MOU, content rightsholders send notices of infringement to a subscriber's ISP.[73] These notices assert ownership and infringement of a copyrighted work by a subscriber of the ISP and contain technical information necessary for the ISP to identify the subscriber (e.g., IP address, date, and time).[74] ISPs receive the notice, match the alleged infringing transaction to their subscriber using the IP address at the relevant time, and generate an alert.[75] Of note, ISPs are not required to generate alerts above a certain undisclosed notice volume.[76] Moreover, ISPs have discretion to temporarily stop processing or reduce the number of ISP Notices processed if in the sole discretion of the ISP, the resulting demand on their systems and resources becomes unreasonable.[77] Justifications for finding such an unreasonable demand are remarkably broad and include disproportionate impact on (1) business processes and systems, on (2) customer service departments arising from subscriber inquiries regarding CAS, and any (3) "other demands on the Participating ISP's businesses processes and systems" that "must be given precedence."[78] Thus, individual ISPs have incredible discretion in how many notices they choose to process and therefore how many alerts ultimately are sent to subscribers.

Upon processing a valid notice of infringement, ISPs generate and send one of six escalating copyright alerts to the subscriber. The six alerts can be divided into three categories: educational measures, acknowledgement measures, and mitigation measures.[79] The first two copyright alerts fall under the umbrella of educational measures.[80] These alerts are informative in nature and do not require a response or acknowledgement from the subscriber. They explain that copyright infringement is illegal, that there are lawful methods of obtaining copyrighted content, and that continued infringement will

72. Nate Anderson, *Irish ISP agrees to disconnect repeat P2P users*, ARS TECHNICA (Jan. 28, 2009, 11:10 PM), http://arstechnica.com/tech-policy/2009/01/irish-isp-agrees-to-disconnect-repeat-p2p-users/.

73. MOU, *supra* note 46, at 6.

74. *Id*.

75. *Id.* at 7.

76. *Id.* ("[E]ach Participating ISP shall not be required to exceed the notice volumes pertaining to its Copyright Alert Program as established in Section 5 of this Agreement.").

77. *Id.* at 16.

78. *Id.*

79. *Id*. at 8.

80. *Id.*

result in imposition of sanctions in the form of the mitigation measures.[81]

The third and fourth copyright alerts are best characterized as acknowledgement measures. These alerts require acknowledgement of receipt but do not require the user to "acknowledge participation in any allegedly infringing activity."[82] Acknowledgement does, however, require that the subscriber agree to immediately stop and/or instruct others using the subscriber's account to stop any infringing content.[83] The method of acknowledgement may be in the form of a temporary landing page requiring a click-through acknowledgement for subsequent online access; in a pop-up notice that persists concurrently with online access until a click-through acknowledgement; or in any other format deemed "reasonable" in the judgment of that ISP.[84]

The last class of copyright alerts, the mitigation measures, are triggered in the fifth and sixth alerts. As with the third and fourth copyright alerts, these alerts require acknowledgement of receipt and after a fourteen day notice period, apply one of several measures: a temporary reduction in bandwidth speed, a temporary step-down in service tier, a temporary redirection to a landing page until subscriber contacts an ISP customer service representative or completes "educational instruction on copyright," a temporary suspension of Internet access, or any other temporary mitigation measure designed by an ISP that is "designed to be comparable."[85] Note that after the sixth alert has been sent, the ISP is not obligated to send further alerts to the subscriber but must keep count of additional notices sent from content rightsholders.[86] Additionally, the alert system effectively resets once an ISP does not receive a notice relating to a subscriber's account within twelve months from the last notice.[87]

3. Appeal Process

Before any mitigation measure in the fifth and sixth copyright alerts is applied, the subscriber has fourteen days to appeal via a

81. MOU, *supra* note 46, at 8.

82. *Id.* at 10.

83. *Id.*

84. *Id.*

85. *Id*. at 11–12.

86. *Id.* at 13.

87. *Id*. ("The ISP must "expunge all prior ISP Notices and Copyright Alerts from the Subscriber's account.").

nonjudicial dispute resolution program.[88] The appeal process, known as the "Independent Review Program," is initiated by a subscriber upon receipt of a mitigation alert and payment of a $35 dollar filing fee.[89] Each appeal is decided by an individual "independent reviewer" selected by an Administrating Organization from a panel of neutral reviewers.[90] The legal principles applied in the independent review process is the "prevailing law as determined by United States federal courts," including such concepts as fair use.[91] These principles are determined for all independent reviewers by an "independent" copyright expert, who is suggested by the Administrating Organization and approved by the CCI Executive Committee.[92]

The MOU allows for just six limited grounds for review of a mitigation measure alert: (1) account misidentification; (2) unauthorized account use; (3) authorized content use; (4) fair use; (5) file misidentification; and (6) work published before 1923.[93] Under the appeal process, the subscriber carries the burden of proof to disprove a presumption of infringement.[94]

B. Critiques of the Original MOU

The original Memorandum of Understanding was undoubtedly written with the goal in mind of giving CCI substantial discretion in setting up the implementation of the Copyright Alert System. Despite this fact, numerous criticisms of the MOU and CAS in general have abounded. This Part will focus on five potential issues in the MOU: (1) education as a goal; (2) the power of the advisory board; (3) the neutrality of the Independent Expert and the Copyright Expert; (4) the severity of mitigation measures; and (5) the limited defenses in the Independent Review Process.[95]

First, one of the many goals of Copyright Alert System and CCI includes "educat[ing]" consumers.[96] The MOU requires that CCI

88. MOU, *supra* note 46, at 14, 30.

89. *Id.* at 30.

90. *Id.* at 31.

91. *Id*. at 35.

92. *Id*.

93. *Id.* at 26.

94. *Id.* at 27.

95. This review will be particularly succinct given the "updated" CAS implementation that deviates somewhat from the original MOU.

96. MOU, *supra* note 46, at 2 (The goals of the Copyright Alert System and CCI include "providing education, privacy protection, fair warning, and an opportunity for review that protects the lawful interests of consumers.").

develop and host online educational programs designed to "inform the public about laws prohibiting [o]nline [i]nfringement and lawful means available to obtain digital works online and through other legitimate means."[97] Because CAS has often been characterized as "private legislation," it is especially important that any "educational" materials be accurate and provide neutral information. Critics have expressed doubt about CCI's ability to educate the public in an unbiased fashion.

A review of CCI's website in late 2012 is telling and reinforces those doubts. If the official CAS website is an indication of the type of education materials to be bundled with alerts and mitigation measures, then CAS will be replete with big-media rhetoric. The educational resources available lack a balanced and objective viewpoint, and resemble indoctrination more than education.

At the time, the CAS website contained a "facts" section that listed a number of curious and outlandish dangers associated with peer-to-peer file sharing. For example, file sharing places "sensitive data" such as "personal health information," "financial records," and "classified documents" at risk.[98] File sharing "means viruses . . . spyware and malware."[99] CCI also appealed to the universal refrain to "save the children" when it alleged that CAS was a way for children to be protected because parents cannot "know everything that kids are viewing or downloading."[100] Such "education" could apply equally as well to the use of standard email and therefore should not be considered relevant within the goals and ambit of CAS, CCI, and the MOU.

CAS further utilizes the "copyright infringement as theft" rhetoric that the U.S. Supreme Court has repeatedly rejected. In its facts section, CCI states: "[O]nly 40 percent of Americans understood the serious legal consequences associated with the distribution of copyrighted content. That compares with the 78 percent who understood the serious legal consequences of *shoplifting* a DVD from the local video store."[101] In direct contrast, the Supreme Court has stated that "infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft,

97. MOU, *supra* note 46, at 4.

98. *Facts*, COPYRIGHTINFORMATION.ORG, http://www.copyrightinformation.org/facts (last visited May 12, 2012) (Note that the page has since been taken down.).

99. *Id.*

100. *Id.*

101. *Id.* (emphasis added).

conversion, or fraud."[102] If CCI and its independent expert on copyright believe this is an accurate description of "prevailing legal principles," then "education" in the MOU truly means anything but.

Similarly, CCI declared that "copyright harms the economy," destroyed 373,000 American jobs, and deprived states of "badly needed . . . tax revenue."[103] Such language is reminiscent of big media rhetoric and shows considerable bias in ignoring the causative versus correlative issues inherent in such a statement. Obviously, a multitude of factors could have resulted or contributed to a loss of jobs in the entertainment industry, including the recent global recession of 2008.

Second, the Advisory Board wields very little substantive power by the terms of the MOU.[104] There is no guarantee of any role for the Advisory Board in decisions it may deem "significant" unless the Executive Committee also considers such an issue "significant."[105] The Executive Committee could therefore exclude the Advisory board simply by declining to find a particular decision "significant." The Advisory Board has no veto power, even if unanimous in its decisions. Furthermore, there is a lack of process information concerning how long Advisory Board members serve or if they could be replaced by the Executive Committee or parties to the MOU.[106] In short, under the terms of the MOU, the Advisory Board has the potential to act as nothing more than a public relations construct to which CCI can attribute efforts to "protect the lawful interest of consumers."[107]

Third, the MOU does not ensure the neutrality or the effectiveness of the Independent Expert and the independent copyright and privacy experts who are to review the CAS methodology and establish the legal principles under which the Independent Review Process will take place. Any recommendations these experts make are confidential and nonbinding.[108] The Executive Committee need not attempt to comply with these recommendations nor to document their reasoning behind such a decision, such as in a rudimentary cost-benefit analysis. Moreover, the Advisory Board has no material authority with regards to expert selection: CCI's

102. Dowling v. United States, 473 U.S. 207, 218 (1985).

103. *Facts, supra* note 98.

104. LaFrance, *supra* note 54, at 169–171; Bridy, *supra* note 54, at 28.

105. LaFrance, *supra* note 54, at 169–171.

106. *Id*. at 170.

107. *See* MOU, *supra* note 46, at 1–2.

108. *See id.* at 5.

Executive Board, i.e., the parties to the MOU, has the sole discretion to choose these experts.[109] Lastly, there is no provision that precludes CCI from replacing any experts with whom they disagree. Thus, as with the Advisory Board, the Executive Committee of CCI has arranged for expert resources to be at its disposal but has handicapped those very same experts from performing their duties.

Fourth, the severity and proportionality of the mitigation measures has been met with considerable and widespread disapproval in the public eye. Under the MOU, ISPs may suspend a subscriber's access during the fifth and sixth Mitigation Alerts.[110] An ISP may also terminate the access of a subscriber who receives a Mitigation Alert or further ISP Notices after a Mitigation Alert.[111] Civil liberties groups have expressed concern that CAS could result in the denial of basic rights to access. The importance of Internet access in today's world means "your access to the world's information and also your right to speak to the world." [112] Accordingly, "it would be wrong for any ISP to cut off subscribers' Internet access, even temporarily, based on allegations that have not been tested in court." [113] In short, denying access to what is already or is developing into a basic right should require proper due process and depend on assertions triable in a court or other governmental adjudication.[114]

Fifth, the Independent Review Process allows for just six limited grounds for review of a mitigation measure alert: (1) account misidentification; (2) unauthorized account use; (3) authorized content use; (4) fair use; (5) file misidentification; and (6) work published before 1923.[115] Generally, these limited defenses have been criticized as overly narrow and restrictive, especially in light of the presumption of infringement.[116] For example, Annemarie Bridy notes that in an account misidentification defense, "copyright owners under the MOU enjoy a rebuttable presumption of correctness as long as their method of capturing IP addresses was not found to be

109. MOU, *supra* note 46, at 5.

110. *Id.* at 12.

111. *Id.* at 7, 9, 13.

112. Smith & Fowler, *supra* note 35 (quoting Jay Stanley, a senior policy analyst with the ACLU in Washington).

113. David Sohn, *ISPs and Copyright Owners Strike a Deal*, CENTER FOR DEMOCRACY AND TECHNOLOGY (July 7, 2011), http://www.cdt.org/blogs/david-sohn/isps-and-copyright-owners-strike-deal.

114. *Id.*

115. MOU, *supra* note 46, at 26.

116. *See* Bridy, *supra* note 54, at 34–37; LaFrance, *supra* note 54, at 175–179.

'fundamentally unreliable' by CCI's independent technical expert."[117] Mary LaFrance finds significant omissions in that the listed grounds for review "do not even come close to encompassing the range of lawful uses for P2P file-sharing."[118] LaFrance has compiled a list of omitted legal grounds for noninfringement that should likewise apply to the CAS Independent Review Process, including fair use, works with copyrights forfeited due to publication without notice, and authorization by a licensee of the content in question.[119] For instance, under CAS, a work qualifying as fair use in an infringement suit, such as a parody, satire, mash-up or commentary, could trigger a Notice and Mitigation Alert, since a substantial portion of the work could consist of copyrighted content.[120] In such cases, the subscriber should be entitled to assert fair use, in any shape or form accepted by federal courts, as valid grounds for appeal.

The CAS MOU essentially set forth a broad set of guidelines that CCI would be held to operate within. Much ink was spilled considering the ramifications of the MOU as a guiding document, but until March 2013 when the Copyright Alert System entered active implementation,[121] little was known about how CAS would operate in practice.[122]

C. Above and Beyond the Original MOU

> The "[The Copyright Alert System] has the potential to be an important educational vehicle that will help reduce peer-to-peer online copyright infringement. Whether it will meet that promise or instead will undermine the rights of Internet users will depend on how it is implemented."[123]

Despite the MOU being signed by all parties in July 2011, details about the specific implementation of CAS, including its Notice discovery methodology as well as its Independent Review Process, were largely unavailable prior to when CAS was in fact rolled out by CCI in March 2013. This Part will summarize the new information on

117. Bridy, *supra* note 54, at 35.

118. LaFrance, *supra*, note 54, at 176.

119. *Id.* at 177.

120. *Id.* at 174.

121. *See* FIRST AMENDMENT TO MEMORANDUM OF UNDERSTANDING 1, COPYRIGHTINFORMATION.ORG, http://www.copyrightinformation.org/wp-content/uploads/2013/02/CCI-MOU-First-Amendment.pdf (last visited May 1, 2013).

122. Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 904–05 (2012).

123. Sohn, *supra* note, at 113.

CAS released primarily in a Congressional Internet Caucus Advisory Committee meeting and in a U.C. Hastings Conference on the Copyright Alert System.[124]Additionally, this Part will focus primarily on MPAA methodology, as provided by MPAA Senior Vice President Marianne Grant.[125]

The CAS methodology involves, sequentially: notice generation; notice validation; ISP alert discretion, generation, and conveyance; and the Independent Review Process. During the notice generation phase, content rightsholders will employ an independent contractor ("Scanning Vendor") to monitor peer-to-peer ("P2P") online file sharing. That Scanning Vendor, announced to be MarkMonitor Inc., will monitor and search for online file sharing via the BitTorrent protocol. [126]

Content rightsholders will provide a database of titles, focusing primarily on recent and popular works, to the Scanning Vendor. This database will contain titles, keywords, and unique digital IDs embedded in the content—allowing the Scanning Vendor to properly ascertain whether a file shared is in fact on the list of monitored titles. The Scanning Vendor operates simply as a peer node in the P2P network, although virtual servers will enable the Scanning Vendor to operate many peer nodes concurrently. While acting as a peer node, the Scanning Vendor will then record and connect to the list of peers sharing content.

Prior to packaging and submitted the Notice to an ISP, the Scanning Vendor must verify the content and the infringer. In order to verify the content, the Scanning Vendor uses a hashing algorithm[127] to create a 'digital fingerprint" of the shared file. If the hash is new to the database, the Scanning Vendor downloads the entire file for

124. Congressional Internet Caucus Advisory Committee, *supra* note 54 (MPAA Vice President Marianne Grant describing the Copyright Alert System as currently implemented); *UC Hastings Conference on Copyright Enforcement in the Digital Age: The Copyright Alert System*, UC Hastings College of the Law (Mar. 29, 2013) [hereinafter, *U.C. Hastings Conference*]; Sarah Laskow, *The new copyright alert system is running*, CJR.ORG (Feb. 28, 2013, 3:30 PM), http://www.cjr.org/cloud_control/cas_system_already_in_action.php?page=all&print=true.

125. *U.C. Hastings Conference, supra* note 125. Nevertheless, Grant has assured the public that the RIAA methodology is substantially similar. *Id.*

126. On behalf of the RIAA, MarkMonitor will also monitor Gnutella and other P2P platforms other than BitTorrent. *Id.*

127. "A hash function is any algorithm or subroutine that maps data sets of variable length to data sets of a fixed length." *Hash Function*, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/Hash_function (last visited Nov 17, 2013).

manual verification.[128] During manual verification, a person watches and reviews the file, comparing its content, size, etc. to a master file. If the hash is already in the database, the file is presumed verified.

In order to "verify" the infringer—i.e., confirm that the alleged infringer is actually uploading pieces of the content in question—the Scanning Vendor utilizes rudimentary network diagnostic tools such as ping and traceroute to ensure that the IP address is "live" at that time. Presumably, this step addresses the proven risk of innocent persons being framed as infringers.[129] For example, researchers were "able to generate hundreds of DMCA takedown notices for [computers at the University of Washington] that were not downloading or sharing any content."[130] Once the content and IP address are verified, the Scanning Vendor packages the evidence—including date, time, IP, ping and traceroute results, and shared content files or pieces—and delivers it to the ISP that controls that particular IP address.

The ISP uses the IP address and date and time records to match the Notice to one of their Subscribers. At this point, the ISP determines whether or not the seven-day grace period following a previous Alert is in effect. If a grace period is not in effect, the ISP generates and sends an Alert to the Subscriber.

In the case that the Alert is the fifth or sixth Mitigation Alert, the Subscriber has the option of pursuing an appeal via the Independent Review Process. The information available regarding the Independent Review Process remains largely the same as during the signing of the MOU, except for two items. First, the MOU was amended in October 2012 to include provisions that allowed the voiding of previous Copyright Alerts, if an appeal of the fifth Mitigation Alert is successful. Second, the Administrating Organization for the Independent Review Process has been selected. The American Arbitration Association ("AAA"), an established and respected dispute resolution organization, will be overseeing the Independent Review process. The choice of AAA will contribute to

128. The RIAA does not employ manual verification, relying instead on automated audio fingerprinting tools. *U.C. Hastings Conference, supra* note 125.

129. Michael Piatek, Tadayoshi Kohno, & Arvind Krishnamurthy, Challenges and Directions for Monitoring P2P File Sharing Networks –or– Why My Printer Received a DMCA Takedown Notice, 1-3, *available at* http://dmca.cs.washington.edu/dmca_hotsec08.pdf

130. *Id.* at 1.

the perception that CCI truly intends for the Independent Review Process to be fair and neutral.[131]

IV. The Proposal: Normative Avoision

Content rightsholders have spearheaded a legal campaign that, though highly successful in the courts, has resulted in significant normative backlash and overall has been counterproductive to their intended goal of increased copyright enforcement. With the signing of the Copyright Alert System's Memorandum of Understanding, content rightsholders seemed poised to make that same mistake again. Fortunately, it appears as though the content industry is coming to realize that normative overdeterrence is causing more harm to its business than good.[132] In its many significant changes to the Copyright Alert System since the signing of the Memorandum of Understanding, CCI and by extension content rightsholders, have deftly handled the very real threat of a normative backlash.

In the copyright litigation campaign, widespread noncompliance fueled by normative viewpoints and overdeterrent enforcement resulted in a "copyright backlash" that undermined support for content rightsholders' pro-copyright goals.[133] With the Copyright Alert System, that same widespread noncompliance remains present.[134] And initially, content rightsholders drafted CAS in a way reminiscent of their overdeterrent litigation campaign.[135] In doing so, rightsholders ran the very real risk of once again creating normative backlash effects that would frustrate their goal of reducing file sharing infringement. However, following hard on the heels of failed pro-copyright legislative endeavors, a popular shift in normative awareness and values has taken place.[136] In response, content rightsholders have finally taken note of the normative consequences

131. LaFrance, *supra* note 54, at 182.

132. *See* Peter S. Menell, *Infringement Conflation*, 64 STAN. L. REV. 1551, 1578 (2012) ("The recording industry has come to recognize that mass enforcement is causing more harm to its business than good under current circumstances."); Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, *available at* http://online.wsj.com/article/SB122966038836021137.html; *see also* Greg Sandoval, *Jammie Thomas Rejects RIAA's $25,000 Settlement Offer*, CNET NEWS (Jan. 27, 2010, 11:00 AM PST), http://news.cnet.com/8301-31001_3-10442482-261.html; *cf.* Depoorter, et al., *supra* note 1, at 1283–89 (arguing that enforcement-based strategies seeking disproportionate sanctions are counterproductive for deterring file sharing of copyrighted works).

133. *See supra* Part II.A.

134. *See supra* Part II.A

135. *See supra* Part III.B.

136. *See infra* Part IV.A.

of their enforcement methods and, through subsequent changes to CAS, have deftly sidestepped the normative backlash dilemma.

A. The Normative Shift

In the last three years, several unsuccessful legislative campaigns spearheaded by content rightsholders have brought to light for the general public the fact that copyright law is sometimes driven by the self-interested efforts of the content industry.[137] The seminal example occurred in late 2011, just after the parties to CAS signed the MOU. Content rightsholders introduced the Stop Online Piracy Act ("SOPA") in the Congressional House of Representatives. Opposition to the bill was powerful and occurred in speed and numbers never before seen.[138] Mark Lemley derided the bills as "pos[ing] grave constitutional problems and . . . potentially disastrous consequences for the stability and security of the Internet's addressing system, for the principle of interconnectivity that has helped drive the Internet's extraordinary growth, and for free expression."[139] Wikipedia, Google, Facebook, Twitter, and over 7,000 other websites protested by "blacking out" their services as a demonstration against the potential censorship embodied in SOPA.[140] Three million people emailed Congress to voice their opposition, and more than four million signed a petition opposing SOPA.[141] In the resulting groundswell, lawmaker after lawmaker renounced support for the legislation, and the bill was subsequently dropped from consideration.[142]

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137. Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 7 (2010).

138. Timothy B. Lee, *SOPA protest by the numbers: 162M pageviews, 7 million signatures*, ARS TECHNICA (Jan. 19, 2012, 10:45 AM), http://arstechnica.com/tech-policy/2012/01/sopa-protest-by-the-numbers-162m-pageviews-7-million-signatures/.

139. Mark Lemley, et al., *Don't Break the Internet*, 64 STAN. L. REV. ONLINE 34 (December 19, 2011), *available at* http://www.stanfordlawreview.org/online/dont-break-internet.

140. Rob Waugh, U.*S Senators withdraw support for anti-piracy bills as 4.5 million people sign Google's anti-censorship petition*, DAILYMAIL.CO.UK (Jan 22, 2011), www.dailymail.co.uk/sciencetech/article-2088860/SOPA-protest-4-5m-people-sign-Googles-anti-censorship-petition.html ("Wikipedia's 'blackout' protest against the U.S. anti-piracy bills SOPA and PIPA has ignited a wave of protest around the world – and up to 18 senators have publicly withdrawn support for the anti-piracy bills, after 7,000 sites 'blacked out', and protestors took to the streets in New York.").

141. *Id. See also* Jenna Wortham, *Public Outcry Over Antipiracy Bills Began as Grass-Roots Grumbling*, NYTIMES.ORG (Jan. 19, 2012), http://www.nytimes.com/2012/01/20/technology/public-outcry-over-antipiracy-bills-began-as-grass-roots-grumbling.html.

142. Wortham, *supra* note 141.

Post-SOPA, the public began to pay more attention to the legal and legislative campaigns of content rightsholders. A significant portion of the public began to believe that their social norms were not reflected in existing copyright law.[143] Critics assessed the copyright landscape and found that a handful of outsized content intermediaries lobbied fiercely "to arrive at copyright laws that enrich[] established copyright industries at the expense of both creators and the general public."[144] Jessica Litman observed that "[c]opyright lobbyists have not shown that recent enhancements to copyright have made it easier or more rewarding for readers, listeners, and viewers to enjoy copyrighted works."[145]

In the public debate that followed, a number of pro-copyright enforcement arguments were shown to be lacking. Content rightsholders' contention that the "sky is falling"—that new technologies were destroying established content industries and eliminating all incentives to create—is a prime example. Several studies came to light that questioned the data cited by content rightsholders to support their claims. In its April 2010 report on "Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods," the Government Accountability Office ("GAO") questioned the metrics and methodology used to support the existence of a growing file sharing problem.[146] The GAO investigation found that the reported damages to the American economy "[could not] be substantiated or traced back to an underlying data source or methodology."[147] A 2012 study showed that U.S. consumers spent more on entertainment today than they did 10 years prior.[148] Conflicting anecdotal evidence from some content rightsholders also painted the pro-copyright movement in a favorable light. Indeed, Jim Griffin, a former head of

143. *See, e.g.*, Peter Yu, *Digital Copyright and Confuzzling Rhetoric*, 13 VAND. J. ENT. & TECH. L. 881, 938 (2011) ("Many [digital natives] do not share the norms reflected in existing copyright law. Many of them also do not understand copyright law or see the benefits of complying with it.").

144. Litman, *supra* note 137, at 7.

145. *Id.* at 29.

146. U.S. Gov't Accountability Office, GAO-10-423, Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods 18 (2010); Casey Rae-Hunter, *Better Mousetraps: Licensing, Access, and Innovation in the New Music Marketplace*, 7 J. BUS. & TECH. L. 35, 67 (2012).

147. Rae-Hunter, *supra* note 146, at 43; *see generally* GAO-10-423, *supra* note 146.

148. Michael Masnick & Michael Ho, THE SKY IS RISING 3 (2012), http://gigaom2.files.wordpress.com/2012/01/theskyisrising.pdf ("By any measure, it appears that we are living in a true Renaissance era for content.").

technology at Geffen Records candidly noted that "[i]n the history of intellectual property, the things we thought would kill us are the things that fed us."[149] Peter Yu explains that these new technologies have generally "open[ed] up new markets for [the content rightsholders'] products and services."[150]

Additionally, the rise and prevalence of file sharing today has enabled an upsurge in the number of remix and mashup works, and consequently the popularity of such works.[151] Unsurprisingly, the public has, at least at the margin, internalized the pro file sharing norms enabling remixed works.

Furthermore, though content rightsholders' have long claimed that copyright infringement is tantamount to theft,[152] the Supreme Court has stated that copyright infringement is fundamentally different than theft because a copyright infringer neither "assumes physical control" nor "wholly deprive[s] its owner of use."[153] Some content rightsholders' have gone so far as to mischaracterize court decisions as "consistently rul[ing] personal file sharing is a copyright infringement and therefore . . . a crime."[154]

Instead of sympathizing with content rightsholders' file-sharing-as-theft rhetoric, the public has started to consider that "right holders should start by abandoning their old business models and adapting them to the new digital reality."[155] Increasingly, the public is displaying a willingness to adopt new and innovative legitimate services—combinations of "technical innovation, [convenient] access to the underlying delivery mechanisms, and reasonable licensing terms"—as solutions within their normative viewpoints and that therefore "serve musicians, rights-holders, and music fans."[156] Netflix and Spotify, buffet-structured online streaming platforms for video

149. J.D. Lasica, DARKNET: HOLLYWOOD'S WAR AGAINST THE DIGITAL GENERATION 109 (2005).

150. Yu, *supra* note 143, at 887.

151. *See generally* Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* 24–25 (2008).

152. *What is Online Piracy,* RIAA.com, http://www.riaa.com/physicalpiracy.php?content_selector=What-is-Online-Piracy, (last visited June 5, 2012) (characterizing file sharing as "music theft").

153. *Dowling*, 473 U.S. at 217–18.

154. The Law, RIAA.com, http://www.riaa.com/physicalpiracy.php?content_selector=piracy_online_the_law, (last visited June 5, 2012).

155. Eldar Haber, *Copyrights in the Stream: The Battle on Webcasting*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 769, 772 (2012).

156. Rae-Hunter, *supra* note 146, at 43–44.

and music respectively, are highly successful examples of the public adopting licensed content platforms, within this normative structure.

Thus, content rightsholders' face the difficult proposition of trying to increase effective copyright enforcement via the Copyright Alert System in an environment which has recently seen the tide flow in favor of pro file sharing social norms.

B. Avoiding a Normative Backlash

Between the time of the original parties signing the MOU and the implementation of CAS today, content rightsholders have changed much in the structure, methodology, and standards of the Copyright Alert System. To be sure, CCI has done much to dispel the many criticisms associated with the original MOU.[157] First, this Part will address the success with which CCI has addressed these critiques, many of which are deeply supported in the new normative framework. Second, this Part examines content rightsholders' split enforcement regime—separately targeting uninitiated versus frequent file sharers—and proposes that such a system abides well within the new normative shift. Accordingly, content rightsholders' new Copyright Alert System may very well prove successful, increasing enforcement in such a way as to minimize normative backlash amongst the majority of the general public.

In Part II.B. this article reviewed five potential issues in the original MOU: (1) education as a goal, (2) the power of the advisory board, (3) the neutrality of the Independent Expert and the Copyright Expert, (4) the severity of mitigation measures, and (5) the limited defenses in the Independent Review Process. As CAS goes into active implementation, CCI has arguably addressed three of these issues.

First, and perhaps most significant as it reflects on the integrity of CAS, the "education" rhetoric has been significantly amended. In a March 2013 panel for the Congressional Internet Caucus Committee, CCI Executive Director Jill Lesser emphasized CCI's focus not on enforcement and punishments but on neutral education and "chang[ing] attitudes."[158] Lesser noted that the CCI website, and especially the educational "fact" section, had been significantly improved.[159] Gone is the language characterizing file sharing as

157. *See supra* Part III.C.

158. Congressional Internet Caucus Advisory Committee, *supra* note 53.

159. *Id*.

outright criminal "theft."[160] Gone are the threats that file sharing "means" viruses, spyware, and malware.[161] Gone is the appeal to "save the children" through CAS.[162] Instead, the CCI site focuses primarily on what copyright is,[163] how CAS works,[164] and where to find convenient and legal access to content.[165]

Second, CCI is (slowly) moving to correct a blunder in which it hired arguably biased firm Stroz Friedberg as its "Independent" Technical Expert. On October 18, 2012, CCI announced that Stroz Friedberg would serve as the CAS Independent Technical Expert.[166] Days later, news outlets broke the story that the firm Stroz Friedberg had formerly been a lobbyist for the RIAA.[167] CCI "drew immediate fire from critics who rightfully questioned the firm's ability to be truly independent in light of its past paid advocacy for corporate rights owners."[168] CCI promptly responded by announcing that they would hire another expert to review Stroz Friedberg's initial evaluation of the CAS methodology.[169] Here, CCI's quick response does much to allay concerns about the legitimacy of CAS.[170]

Third, CCI has repeatedly declared that termination of a subscriber's service is not required and is not the ultimate goal of

160. *See Facts*, *supra* note 98.

161. *See Facts*, *supra* note 98.

162. *See id.*

163. *Resources & FAQ*, COPYRIGHTINFORMATION.ORG, http://www.copyrightinformation.org/resources-faq/what-is-copyright/ (last visited May 1, 2013).

164. The Copyright Alert System, COPYRIGHTINFORMATION.ORG, http://www.copyrightinformation.org/ the-copyright-alert-system (last visited May 1, 2013).

165. *A Better Way to Find Movies, TV & Music*, COPYRIGHTINFORMATION.ORG, http://www.copyrightinformation.org/a-better-way-to-find-movies-tv-music (last visited May 1, 2013).

166. *See* Ernesto, *Six-Strikes "Independent Expert" Is RIAA's Former Lobbying Firm*, TORRENTFREAK.COM (Oct. 22, 2012), https://torrentfreak.com/six-strikes-independent-expert-is-riaas-former-lobbying-firm-121022 (reporting on Stroz Friedberg's prior business relationship with the RIAA).

167. *Id.*

168. Bridy, *supra* note 55, at 30.

169. Ernesto, *Six Strikes" Evidence Re-reviewed to Fix RIAA Lobbying Controversy*, TORRENTFREAK.COM (Oct. 31, 2012), torrentfreak.com/six-strikes-evidence-re-reviewed-to-fix-riaa-lobbying-controversy-121031 ("We are sensitive to any appearance that Stroz lacks independence, and so CCI has decided to have another expert review Stroz's initial evaluation of the content community's processes. We will be selecting the additional expert promptly and will make that information available.").

170. However, as of March 8, 2013, the additional independent technical expert has not yet been named. Ernesto, "*Six Strikes" Evidence Still Waiting for Impartial Re-review*, TORRENTFREAK.COM (Mar. 8, 2013), torrentfreak.com/six-strikes-evidence-still-waiting-for-impartial-reexamination-130308.

CAS.[171] CCI leaves the specific choice and implementation of Mitigation Measure up to the ISP.[172] Cablevision is the only major ISP that will completely suspend (for 24 hours) customers' Internet service. Verizon is the only ISP that will cap customers' data speeds under CAS.[173] Thus, CCI has placated criticisms of normatively unfair and disproportionate sanctions, such as complete termination of basic rights of access to the Internet.

Admittedly, CCI has not addressed the power of the Advisory Board or the limited defenses available in the Independent Review Process. On the whole, however, CCI has made some effort to address and stay within the ambits of the new normative shift. Accordingly, at least for the majority of the public, the level of enforcement associated with the Copyright Alert System is likely not excessive enough to trigger a normative backlash.

However, content rightsholders recognize that this normatively compliant version of CAS will likely not "be able to deal with the hard-core infringers" and "is not likely to change that behavior."[174] Content rightsholders have reserved the possibility that [content rightsholders] would sue those it suspected of habitual piracy, as it did roughly 35,000 people between 2003 and 2008."[175] Content rightsholders have thus effectively adopted a split enforcement effort that focuses litigation on frequent file sharers with deeply internalized pro-sharing norms, and pro-copyright education on nascent to moderate file sharers who have not yet deeply internalized pro-sharing norms.

And so this article comes full circle to Professor Depoorter's suggestion to content rightsholders in *Copyright Backlash*: "[E]nforcement efforts would likely be more effective if targeted specifically to different types of copyright offenders." Content rightsholders have listened. This new split enforcement regime, consisting of the Copyright Alert System and reserved litigation, has the potential to not only avoid a normative backlash effect but to promote pro-copyright norms among occasional infringers. In light of content rightsholders recent litigation and legislative campaign debacles, the Copyright Alert System represents a new hope for their pro-copyright efforts.

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171. Congressional Internet Caucus Advisory Committee, *supra* note 53.

172. Alex Fitzpatrick, *ISPs Finally Explain How 'Six Strikes' Anti-Piracy Program Will Work*, MASHABLE.COM (Feb. 27, 2013), www.mashable.com/2013/02/27/isps-six-strikes.

173. *Id.*

174. Smith & Fowler, *supra* note 35; *U.C. Hastings Conference, supra* note 125.

175. Smith & Fowler, *supra* note 35.

C. Issues Beyond Backlash

Though this concludes the normative backlash and normative avoision analysis, this article does not suggest that all substantive issues with the Copyright Alert System have been resolved. For example, questions remain regarding the validity of CAS as "private legislation,"[176] whether ISPs are sufficiently adversarial to content rightsholders to ensure safeguards for the public,[177] the government's role in pushing ISPs towards a private solution for content rightsholders,[178] and whether the process from start to continued implementation is sufficiently transparent.[179] These questions persist but exist outside the scope of this article.

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176. "[S]tate-promoted private ordering represents a species of policymaking that is insulated from public scrutiny and that can be tailored, by virtue of that insulation, to serve corporate interests at the public's expense." Annemarie Bridy, *ACTA and the Specter of Graduated Response*, 26 AM. U. INT'L L. REV. 559, 578 (2011).

177. Many believe reducing online traffic in an effort to curb bandwidith infrastructure costs are the primary motivator behind ISPs backing CAS. Larry Dignan, *Why RIAA, ISP Cooperation May Deliver Returns for Both Sides*, ZDNET.COM (Jan. 29, 2009, 3:33 AM), http://www.zdnet.com/blog/btl/why-riaa-isp-cooperation-may-deliver-returns-for-both-sides/11893; Greg Sandoval, *Comcast, Cox Cooperating with RIAA in Antipiracy Campaign*, CNETNEWS.COM (Mar. 25, 2009, 9:49 AM), http://news.cnet.com/8301-1023_3-10204047-93.html; John M. Owen, *Graduated Response Systems and the Market for Copyrighted Works*, 27 BERKELEY TECH. L.J. 559, 583 (2012); *see* ENVISIONAL, TECHNICAL REPORT: AN ESTIMATE OF INFRINGING USE OF THE INTERNET (Jan. 2011), *available* at http:// documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf (reporting that the transmission of infringing material accounts for about a quarter of all Internet traffic); *see also* Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement,* 89 OR. L. REV. 81, 86 (2010) ("[T]he decision of broadband providers to implement intelligent network technology to gain greater control over the traffic that crosses their networks. Considering these consequences, it may be no more than prudent from a liability standpoint for broadband operators to engage with content owners in a renegotiation of the division of labor for online copyright enforcement."). Note that historically ISPs have not sided with content rightsholders. *See* Smith & Fowler, *supra* note 35 ("The cooperation between media and technology companies represents a shift in a relationship that had been a contentious one. . . . But as illegal movie downloaders started to strain their networks ISPs grew more willing to clamp down."); *see, e.g.*, MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR ORDER TO SHOW CAUSE at 2, AF Holdings, LLC v. Comcast Cable Communications, No. 12-C-3516 (N.D. Ill. June 1, 2012), ("[P]laintiffs should not be allowed to profit from unfair litigation tactics whereby they use the offices of the Court as an inexpensive means to gain Doe defendants' personal information and coerce 'settlements' from them.").

178. "President Barack Obama's administration reportedly threatened ISPs with legislation that would mandate termination of the accounts of users accused of intellectual property infringement and also blocking of infringing content itself, as a cudgel to press providers to agree to implement these measures voluntarily. The resulting agreement between ISPs and content providers was negotiated, if not in the shadow of the law, then in the threat of such shadow." Bambauer, *supra* note 123, at 896.

179. LaFrance, *supra* note 54, at 167 (focusing transparency and public participation as missing from the development of CAS).

V. Conclusion

Previously, content rightsholders spearheaded a legal campaign that, though highly successful in the courts, has resulted in significant normative backlash and overall has been counterproductive to their intended goal of increased copyright enforcement. With the signing of the Copyright Alert System's Memorandum of Understanding, content rightsholders seemed poised to make that same mistake again. In a prime example of what this article has termed "normative avoision," content rightsholders have finally taken note of the normative consequences of their enforcement methods and, through subsequent changes to CAS, have deftly sidestepped the normative backlash dilemma.

Content rightsholders' split enforcement regime—separately targeting uninitiated versus frequent file sharers—proposes a system that abides well within the new normative shift. Content rightsholders have thus effectively adopted a split enforcement effort that focuses litigation on frequent file sharers with deeply internalized pro-sharing norms, and pro-copyright education on nascent to moderate file sharers who have not yet deeply internalized pro-sharing norms. Accordingly, content rightsholders' new Copyright Alert System may very well prove successful, increasing enforcement in such a way as to minimize normative backlash amongst the majority of the general public. In light of content rightsholders recent litigation and legislative campaign debacles, the Copyright Alert System represents a new hope for their pro-copyright efforts.